

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SAMUEL CAWYER, individually and on
behalf of DIMITRI "PETE" CAWYER, a
minor,

Plaintiffs,

v.

SEARS, ROEBUCK AND CO.;
HUSQVARNA OUTDOOR PRODUCTS,
INC., FORMERLY ELECTROLUX HOME
PRODUCTS, INC.,

Defendants.

CASE NO. C06-5391RJB

ORDER RE-NOTING
PLAINTIFF'S FIRST MOTION
TO COMPEL RE: DEFENDANT
HUSQVARNA AND
DEFENDANTS' MOTION FOR A
PROTECTIVE ORDER

This matter comes before the Court on Plaintiff's First Motion to Compel RE:
Defendant Husqvarna (Dkt. 13) and Defendants' Motion for a Protective Order (Dkt. 22). The
Court has considered the pleadings filed in support of and in opposition to the motions and the
remainder of the file herein.

I. FACTUAL BACKGROUND AND PROCEDURAL BACKGROUND

According to the Amended Complaint, Virgil Cawyer was operating a Sears Craftsmen
lawn tractor in reverse to when the mower made contact with Dimitri "Pete" Cawyer, his paternal
grandson. D kt. 1. As a result, Pete Cawyer suffered injuries to his body and to his left leg and
foot. *Id.* The plaintiff brings suit against Sears Roebuck and Company and Husqvarna Outdoor
Products, Inc. for the following: violation of the Washington Product Liability Act; negligence;

1 strict liability; Restatement (2d) of Torts, 402A; breach of express warranty; breach of implied
2 warranty; defective design; inadequate warnings; inadequate instructions; misrepresentation and
3 concealment of information; and violation of the Washington Consumer Protection Act. *Id.* at 3.

4 The discovery deadline in this case is May 21, 2007. Dkt. 9. On February 21, 2007, the
5 plaintiff moved to compel the defendants to fully answer discovery requests. Dkt. 13, 14. The
6 Court re-noted the portion of the motion pertaining to Requests for Production 13, 16, and 18 in
7 order to allow the parties to move for a protective order governing the Project 405 file, the
8 Tracey Walters videotape, and “the 2002 Universal Terms and Conditions document.” Dkt. 21 at
9 6. The defendants have moved for a protective order, and the motion to compel responses to
10 requests for production 13, 16, and 18 is ripe for the Court’s review. See Dkt. 22, 13.

11 The subject of this discovery dispute is the defendant’s Project 405 file. According to
12 Husqvarna, the Project 405 file was compiled over a five or six year period by Tracey Walters, a
13 project engineer for Husqvarna, and contains 2,271 pages of engineering notes, brainstorming
14 notes, drawings, specifications, and other documents used to develop Husqvarna’s Reverse
15 Operation System. Dkt. 22 at 2-3. The Reverse Operation System was implemented in August of
16 2004. Dkt. 19 at 2. The Project 405 file also includes a demonstration video of a proposed design.
17 *Id.* at 2. The defendants filed, under seal, illustrative exhibits from the Project 405 file and offer
18 to provide the Court with a compact disc containing the entire file. Dkt. 22 at 3 n.1.

19 II. DISCUSSION

20 Protective orders are governed by Federal Rule 26, which provides as follows:

21 Protective Orders. Upon motion by a party or by the person from whom discovery is
22 sought, accompanied by a certification that the movant has in good faith conferred or
23 attempted to confer with other affected parties in an effort to resolve the dispute without
24 court action, and for good cause shown, the court in which the action is pending or
25 alternatively, on matters relating to a deposition, the court in the district where the
26 deposition is to be taken may make any order which justice requires to protect a party or
27 person from annoyance, embarrassment, oppression, or undue burden or expense,
28 including one or more of the following:

...

(7) that a trade secret or other confidential research, development, or commercial
information not be revealed or be revealed only in a designated way;

1 Fed. R. Civ. P. 26(c).

2 Under Washington law, a trade secret is defined as follows:

3 (4) "Trade secret" means information, including a formula, pattern, compilation, program,
4 device, method, technique, or process that:

5 (a) Derives independent economic value, actual or potential, from not being generally
6 known to, and not being readily ascertainable by proper means by, other persons who can
7 obtain economic value from its disclosure or use; and

8 (b) Is the subject of efforts that are reasonable under the circumstances to maintain its
9 secrecy.

10 RCW 19.108.010(4).

11 **A. ENTRY OF PROTECTIVE ORDER**

12 The plaintiffs object to entry of a protective order on the grounds that the Project 405 file
13 does not contain trade secrets. First, the plaintiffs contend that the Reverse Operation System is
14 generally known because it is not materially different from "the 'engine kill' safety features
15 developed by MTD/Cub Cadet in the 1980s" and "the four (4) position patented console switch
16 developed by Murray." Dkt. 24 at 5. The defendant concedes that the Reverse Operation System
17 utilizes a part patented by Murray but contends that the system as a whole was developed by
18 Husqvarna for its tractors. Dkt. 19 at 2. The plaintiffs acknowledge that the Reverse Operation
19 System differs from the system patented by Murray because the Reverse Operation System
20 includes an additional override setting. Dkt. 24 at 5.

21 Second, the plaintiffs contend that as of January 2003, the Project 405 file did not contain
22 information pertaining to the Reverse Operation System. Dkt. 24 at 3. The Project 405 file has
23 grown since 2003, however. Dkt. 19 at 2.

24 Finally, the plaintiffs contend that certain portions of the Project 405 file were made a
25 matter of public record in a case pending in Kentucky and should therefore be excluded from
26 protection. Dkt. 24 at 3. The plaintiffs ask that the Court require the defendants to produce a log
27 listing documents qualifying as trade secrets.

28 While some of the Project 405 files justify entry of a protective order, the Court is not yet

1 in a position to determine which documents are deserving of such protection and is unwilling to
2 issue a blanket protective order governing the entire Project 405 file.

3 **B. TERMS OF PROPOSED PROTECTIVE ORDER**

4 The proposed protective order submitted in this case is deficient in the following respects.
5 First, the request is too broad. The proposed protective order is not limited to the Project 405 file,
6 and the terms of the order give discretion to the parties to designate documents subject to the
7 protective order. *See* Dkt. 22-2, Exh. A. at 2-3. Any request for a protective order to be entered
8 by the Court must be narrowly drawn, clearly identifying the class or type of documents subject to
9 the protective order and the reason underlying the request for the order.

10 Second, the proposed order provides for the filing of documents under seal without a
11 motion to the Court. Dkt. 22 at 3. Each time that the parties propose to file documents under
12 seal, they should file a motion and make “a compelling showing.” *See* Local Rule CR 5(g).

13 Third, the proposed order provides that confidential documents and copies thereof must
14 be returned. Dkt. 22-2, Exh. A at 6. This provision does not contain an exception for documents
15 filed with the Court.

16 Finally, the order must contain a provision that the Court may change the terms of the
17 protective order on its own motion after notice to the parties and an opportunity to be heard. The
18 parties may, of course, agree on confidentiality among themselves, but when the parties request
19 the involvement of the Court, the parties must make the requisite showing.

20 **C. PLAINTIFFS’ OBJECTIONS**

21 The plaintiffs contend that if the Court determines that a protective order is warranted, the
22 Court should decline to include certain portions of the defendants’ proposed protective order.

23 First, the plaintiffs urge the Court to exclude provisions prohibiting retention of
24 documents at the conclusion of the litigation. Dkt. 24 at 6. The plaintiffs contend that the Court
25 should protect documents in the Project 405 file from the defendants’ document destruction
26 policies. Dkt. 24 at 6. The plaintiffs cite an opinion from the Circuit Court of Cook County,
27 Illinois, in which the court concluded that Sears has a retention policy that prevents discovery.
28 Dkt. 24 at 7. The lawfulness and efficacy of Husqvarna’s document retention policy is not an

1 issue before the Court.

2 Second, the plaintiffs object to provisions of the proposed protective order regarding
3 disclosure of work product. Dkt. 24 at 6. The proposed protective order allows for disclosure of
4 work product containing information in or derived from the Project 405 file to several classes of
5 people who may be associated with this action. *See* Dkt. 22-2, Exh. A at 3-4. The plaintiffs have
6 not demonstrated that the proposed protective order is overly restrictive in this regard.

7 Third, the plaintiffs urge the Court to remove language from the proposed protective
8 order regarding sealing or extinguishing “attorney work product created from the Project 405
9 file.” Dkt. 24 at 9. The proposed protective order is limited to potential work product “relating”
10 to confidential materials and should instead be limited to materials derived from the Project 405
11 file.

12 Fourth, the plaintiffs contend that the proposed protective order should not prohibit
13 plaintiffs’ counsel from “verifying the completeness of the documents with other attorneys
14 involved in NMIR litigation with these same Defendants’ attorneys.” Dkt. 24 at 10. The plaintiffs
15 offer a protective order governing the Project 405 file in a different case and ask that the Court
16 take a similar approach. While the proposed protective order does not explicitly provide for such
17 verification efforts, it does allow for disclosure to experts and consultants. *See* Dkt. 22-2, Exh. at
18 4. The proposed protective order is not overly restrictive in this regard.

19 Finally, the plaintiffs ask that any protective order not restrict the use of documents
20 contained in the Project 405 file in connection with pre-trial motions or publishing documents to
21 the jury at the trial of this case. The proposed protective order does not appear to have such an
22 effect, but the Court notes that whether documents may be published to the jury is an issue not yet
23 before the Court.

24 **D. SURREPLY**

25 On April 11, 2007, plaintiffs’ counsel filed a declaration opposing the defendants’ reply.
26 Dkt. 27. The declaration contains a list of state and federal cases. *See id.* This document, filed
27 after the motion noting date, fails to comply with Local Rule CR 7(g) and has not been
28 considered.

1 **E. CONCLUSION**

2 The defendants have demonstrated that a protective order is warranted to protect trade
3 secrets contained in the Project 405 file, but the Court is not yet able to determine which of the
4 Project 405 file documents contain trade secrets. The defendants must demonstrate good cause
5 for justifying protection of each document to be governed by a protective order. The Court
6 should therefore re-note Defendants' Motion for a Protective Order (Dkt. 22) and Plaintiff's First
7 Motion to Compel RE: Defendant Husqvarna (Dkt. 13) to allow for supplemental briefing as to
8 which documents in the Project 405 file should be protected. In light of the upcoming discovery
9 deadline, the parties are encouraged to work together to come to an agreement on the pending
10 motions.

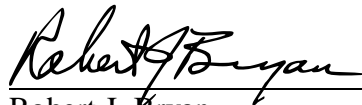
11 **III. ORDER**

12 Therefore, it is hereby

13 **ORDERED** that Plaintiff's First Motion to Compel RE: Defendant Husqvarna (Dkt. 13)
14 and Defendants' Motion for a Protective Order (Dkt. 22) are **RE-NOTED** for consideration on
15 May 4, 2007. The parties may supplement their briefing as follows: the defendants' brief is due
16 April 23, 2007; the response is due April 30, 2007; the reply is due May 4, 2007.

17 The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel
18 of record and to any party appearing *pro se* at said party's last known address.

19 DATED this 16th day of April, 2007.

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21 
22 Robert J. Bryan
23 United States District Judge
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